



Kentucky Law Journal

Volume 41 | Issue 1

Article 13

1952

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Recommended Citation

McKaig, Diane Louise (1952) "Defamation--Retraction--A Bill that Didn't Pass," *Kentucky Law Journal*: Vol. 41 : Iss. 1 , Article 13.
Available at: <https://uknowledge.uky.edu/klj/vol41/iss1/13>

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DEFAMATION—RETRACTION— A BILL THAT DIDN'T PASS

The rapid growth of modern methods of communication presents perplexing problems to the courts and legislatures of today. One of the most controversial among these problems is: To what extent should the radio and television stations and newspapers be held liable for defamatory statements?

Having developed according to no particular plan,¹ the law of defamation is generally said by the authorities to be insufficient to meet current libel and slander controversies, even between individuals.² Reform is needed in the whole field of defamation, and especially in that part which concerns newspapers and broadcasters since, on the one hand, the chance of defamation is greatly increased, and on the other, the simple wrong is multiplied by the vast number of people reached when the words are disseminated through these means.

At common law the press and radio possessed no immunities not shared by all individuals.³ Absolute liability was applied to all cases of newspaper defamation⁴ even if a retraction was made, as a retraction was no defense.⁵ Absolute liability was also imposed in cases of radio defamation when the particular jurisdiction considered such defamation as libel. The only relief afforded broadcasters under common law principles was in those jurisdictions which considered radio defamation as slander: where the words were not slanderous per se the person defamed had to prove damages affecting his pecuniary interests.⁶

¹ PROSSER, TORTS 778 (1941).

² POLLACK, LAW OF TORTS, 237 (12th ed. 1923); Courtney, *Absurdities of the Law of Slander and Libel*, 36 AM. L. REV. 552 (1902).

³ *Edwards v. San Jose Printing Co.*, 99 Cal. 431, 34 Pac. 128 (1893); *Louisville Times Co. v. Lyttle*, 257 Ky. 132, 77 S.W. 2d 432 (1934); *Aldrich v. The Press Printing Co.*, 9 Minn. 123 (1864).

⁴ "All libel is actionable without proof that damage has occurred." PROSSER, TORTS 793 (1941). "It is well settled that in the absence of a statute newspapers as such have no peculiar privilege, but are liable for what they publish in the same manner as the rest of the community." 53 CORP. JUR. SEC. 197 (1948). Also see Hibsichman, *Liability of News Vendors or Distributors for Libel*, 5 JOHN MARSHALL L. Q. 416, 421 (1902); MCCORMICK, DAMAGES 422-423 (1935).

⁵ *Supra* note 1 at 856.

⁶ 44 AM. JUR. 196 (1942).

One common legislative device to deflect the harsh effect of the common law rules when applied to news disseminators is to use retraction as a mitigating factor. As early as 1910 the Kentucky General Assembly passed a statute, now Kentucky Revised Statutes 411.050,⁷ which limited the liability of one who published a false and libelous statement if the statement was made without malice and a sufficient retraction was printed. In such cases no punitive damages were allowed, and the retraction could be pleaded in mitigation of any actual damages. In Kentucky at the present time a defamed person will be allowed recompense for injuries to his occupation, business, reputation, and character, and for humiliation and mental distress.⁸ However, if there is no actual malice and a retraction is made, no punitive or vindictive damages will be allowed.⁹

Statutes concerning retraction in mitigation of damages have been passed in the majority of states. These statutes vary, of course, as to the amount of relief given. They can, however, be divided into six general classifications, beginning with those most favorable to the person defamed:

1. Statutes allowing retraction in mitigation of punitive damages only.¹⁰
2. Statutes allowing retraction in mitigation of all damages.¹¹
3. Statutes providing that any "mitigating circumstances" will reduce damages.¹² Retraction is generally regarded as a relevant mitigating circumstance.¹³
4. Statutes providing that the plaintiff may recover no punitive, but all actual damages if a retraction has been made.¹⁴

⁷ Ky. STAT. 2438b-1 (Carroll, 1915).

⁸ *McClintock v. McClure*, 171 Ky. 714, 188 S.W. 867 (1916).

⁹ *Reid v. Nichols*, 166 Ky. 423, 179 S.W. 440 (1915).

¹⁰ 4 MICH. COMP. LAWS sec. 620.23 (1948).

¹¹ 2 ME. REV. STAT. c. 100, sec. 48 (1944); TEX. STAT., REV. CIV. art. 5431 (Vernon, 1936); W. VA. CODE ANN. sec. 5725 (1949).

¹² 3 ARK. STAT. ANN. sec. 27-1149 (1947); 2 IDAHO CODE ANN. sec. 5-811 (1948); KAN. GEN. STAT. ANN. sec. 60-746 (1949); 2 MISS. CODE ANN. sec. 1479 (1942); 2 MO. REV. STAT. ANN. sec. 509.210 (1949); 7 MONT. REV. CODES ANN. sec. 93.3813 (1947); 2 NEB. REV. STAT. sec. 25-840 (1943); 4 NEV. COMP. LAWS ANN. sec. 8630 (Willyer, 1929); 2 N. M. STAT. ANN. sec. 19-409 (1941); N. Y. CIV. PRAC. ACT sec. 338 (Thompson, 1939); 1 ORE. COMP. LAWS ANN. sec. 1-909 (1940); 1 S. C. CODE ANN. sec. 483 (1942); 1 WYO. COMP. STAT. ANN. sec. 3-1416 (1945).

¹³ 33 AM. JUR. 202-203 (1941).

¹⁴ 3 CONN. GEN. STAT. REV. c. 390, sec. 7983 (1949); 44 DEL. LAWS c. 177,

5. Statutes providing that if there is a retraction, no punitive damages will be allowed, and the retraction can be used in mitigation of the actual damages.¹⁵
6. Statutes providing that if a retraction is made, only "special damages" shall be allowed, special damages being defined to mean damages affecting the plaintiff's pecuniary interests.¹⁶

It should be noted that the existing Kentucky statute is in category five, placing Kentucky among the four states which are the most lenient toward the person who publishes the defamatory words. Still, at the January 1952 session of the Kentucky General Assembly, House Bill No. 63,¹⁷ sponsored by the Kentucky Press Association and the Kentucky Association of Broadcasters,¹⁸ was introduced in the House of Representatives. Section 1a of this bill provides that if the newspaper, or television or radio station that made the defamatory statement makes a conspicuous and timely correction, the defamed person shall recover no more than special damages.

One change this new bill would make is that it would extend the scope of relief by retraction to include visual and sound broadcasts. The Kentucky statute, as it stands, pertains only to newspapers. As has been stated previously, there is a need for legislation which would include all three of these modes of communication. Therefore, the new bill, insofar as it attempts to put radio and television stations on the same footing with newspapers, is worthwhile. However, this proposed amendment would do much more than provide that the limitations now applied to newspapers

sec. 1a (1943); 2 FLA. STAT. sec. 770.02 (1949); 2 IND. STAT. ANN. sec. 2-1043 (Burns, 1933); 2 IOWA CODE sec. 659.2 (1946); MASS. ACTS AND RESOLVES sec. 360 (1943); 2a N. J. REV. STAT. sec. 43.2 (1951); 2c N. C. GEN. STAT. sec. 99-2 (1950); 2 N. D. REV. CODE sec. 14-0208 (1943) (Statutes says only damages to property, business, trade, etc., will be allowed. However, this was construed to mean that only exemplary damages are excluded, *Meyerle v. Pioneer Pub. Co.*, 45 N. D. 568, 178 N.W. 192 (1920)); 8 OHIO GEN. CODE ANN. sec. 11343 (Page, 1938) (Statute says only that retraction rebuts malice. It was then held that if there is no malice, no punitive damages will be allowed. *Moses Kahn v. Cincinnati Times Star*, 10 Ohio Dec. 599 (1895); *Mauk v. Brundage*, 68 O. S. 89, 67 N.E. 152 (1903)); OKLA. STAT. ANN. tit. 12, sec. 1446a (1941); 3 S. D. CODE sec. 47.05404 (1939); 4 UTAH tit. 62, c. 2, sec. 1 (1943); WIS. STAT. ANN. sec. 331.05(2) (1949).

¹⁵ ALA. CODE ANN. tit. 7, sec. 913, 914 (1940); KY. REV. STAT. sec. 411.050 (1948).

¹⁶ CAL. CIV. CODE ANN. sec. 48a (1949); 2 MINN. STAT. sec. 548.06 (1945).

¹⁷ See Appendix section 1.

¹⁸ See Louisville Courier-Journal, March 19, 1952, sec. 2, p. 1, col. 6.

should apply to broadcasting stations. The bill would make four other drastic changes in the Kentucky law of defamation which are extremely favorable to newspapers and broadcasters which have made defamatory statements.

The first of these changes concerns the number of official retractions to be made. The present Kentucky law¹⁹ provides that a retraction, to be sufficient, must be made in at least two successive issues of the publication and be accompanied by editorials in which the libelous statement is specifically repudiated. Under the proposed amendment, one publication would be sufficient and no editorial repudiation would be required. It has been said that "thousands may have read the libelous matter that never saw its refutation."²⁰ This conclusion is even more evident when only one retraction is made. Thousands might have read the libelous matter who didn't happen to read the one particular paper that the retraction appeared in. It would seem that a person who had been besmeared by a libelous attack is entitled to at least two publications of the refutation, so that as many people as possible might be reached and their false idea concerning the defamed person corrected. Specific editorial repudiations would also serve a purpose; not only might additional people be reached, but those who read both the retraction itself and the editorial would, by repetition, have it firmly impressed upon them that the previous statement was false.

Another change the new bill would make is in the content of the retraction. Sections 1b and 1c of House Bill No. 63 provide that when the plaintiff requests a correction, he must state wherein the defamatory matter was false and *set forth the true facts*. It appears that requiring a defamed person to set forth the true facts concerning matters in his private life is an encroachment upon his privacy. A person should not be forced to open the pages of his private life to public gaze because someone else made an error.

A correction is generally an acknowledgment that the prior statement was false. Under this amendment the defendant would have the alternative of publishing the plaintiff's true statement of the facts. In other words, the disseminator "can just say, 'Jones

¹⁹ KY. REV. STAT., sec. 411.050 (1948).

²⁰ Cass v. New Orleans Times, 27 La. Ann. 214 (1875).

says this isn't so.' And that is all."²¹ This type of retraction would do more to put the defamatory statement in issue than clear the plaintiff's name. Generally it is not a retraction to publish a statement that the defamed person denied the charge.²²

A third pro-disseminator change the new bill would make concerns the presence or absence of malice. Section 411.050 of the Kentucky Revised Statutes provides that a prerequisite to allowing retraction in mitigation of damages is that the defamatory statement must have been "published without malice". There is no mention of malice in the proposed amendment, which would seem to mean that, even though a publisher disseminated the libelous matter maliciously, he would be liable only for special damages if he merely printed a correction. If this amendment had been passed, one who printed a falsehood concerning another with malicious intent to harm would be liable only to the same extent as one who published a misstatement honestly think it was true.

The general rule is that one who maliciously publishes a defamatory statement is liable for punitive or vindictive damages.²³ The majority of the state statutes which provide that a public retraction of a libelous charge may be put in evidence on the issue of damages limit the situations in which mitigation may be made to those wherein the libelous charge was made without actual malice.²⁴ Kentucky now stands with the majority and exacts a special punishment for deliberate harm. Should it adopt this or a similar amendment which would, in effect, legalize maliciousness? Surely justice demands that a more stringent penalty be placed upon those who act with malicious intent than upon those who are guilty of negligence or mere mistake.

The most serious change that would be made by House Bill No. 63 is in the amount of damages recoverable. Section 1a provides that the defamed person shall recover no more than "special damages" if a correction is made. Section 1f defines special damages as "pecuniary damages which the plaintiff alleges and proves he has suffered in respect to his property, business, trade, profes-

²¹ *Supra* note 18.

²² 33 AM. JUR. 122 (1941).

²³ MCCORMICK, DAMAGES 430 (1935).

²⁴ For example see 3 CONN. GEN. STAT. REV. c. 390 sec. 7983 (1949); 2a N. J. REV. STAT. sec. 43.2 (1951); 2c N. C. GEN. STAT. sec. 99-2 (1950); OKLA. STAT. ANN. tit. 12, sec. 1446a (1941).

sion or occupation, and no other." This is the same type of damages that the common law exacts in cases of slander when the words are not slanderous per se; a type that cannot be found in many fact situations even though the plaintiff has been seriously injured; a type about which an eminent authority has said "while the loss of customers, or business, or a particular contract, or employment, or of an advantageous marriage will be sufficient to make the slander actionable, it is not enough that the plaintiff has lost the society of his friends and associates . . . or that he has suffered acute mental distress and serious physical illness as a result of the defamation."²⁵ Thus, under the proposed amendment, a person whose reputation had been disastrously affected by a defamatory attack could recover nothing if his income was not impaired. Such an amendment would make all housewives, students, pensions-holders, and coupon clippers fair game for libelous attacks.

It is submitted that a person's right to be secure in his good name could not be constitutionally limited in this manner. Prior to 1904 an existing Kansas statute²⁶ provided that if the defendant alleged and proved that the libelous matter was printed in good faith and a sufficient retraction was made, the plaintiff could recover only actual damages. Actual damages were defined as being those suffered by the plaintiff in respect to his property, business, trade, profession or occupation, and no others. It will be noted that this statute was, in effect, similar to the proposed Kentucky amendment, except that the Kansas statute, unlike the amendment, did demand good faith. A case requiring a construction of this statute came before the Supreme Court of Kansas in 1904.²⁷ This court held that the statute in question was unconstitutional, saying:

"There is no room for holding in a constitutional system, that private reputation is any more subject to be removed by statute from full legal protection, than life, liberty or property. . . . We are well persuaded that the criticized act takes from the libeled person the right of remedy by due course of law for an injury suffered in his reputation, and

²⁵ PROSSER, TORTS 805, 806 (1941).

²⁶ KAN. GEN. STAT. c. 576 (1901) as cited in *Hanson v. Krehbiel*, 68 Kan. 824, 75 P. 1041 (1904).

²⁷ *Hanson v. Krehbiel*, 68 Kan. 824, 75 P. 1041 (1904).

hence is invalid under the quoted constitutional provision (fourteenth amendment)."²⁸

A statute allowing only pecuniary damages after retraction, if the defendant had acted in good faith,²⁹ was also held unconstitutional in Michigan,³⁰ the court saying that such statute deprived the defamed one of an adequate remedy at law. As a matter of justice, it was said that "Exploded lies are continually reproduced without the antidote, and no one can measure with any accurate standard the precise amount of evil done or probable".³¹

An Ohio statute which provided that the defamed person could elect to stand on his common law rights or waive a part of the damage by demanding a retraction³² was also held unconstitutional, the court saying that the legislature did not give the people their constitutional rights and it could not take them away.³³

Pecuniary damage statutes passed in three other states,³⁴ although not held unconstitutional, were construed by the courts to mean either that such damages included everything but punitive,³⁵ or that the statute merely meant that the retraction could be pleaded in mitigation of general damages.³⁶ The court deciding the last case, by way of dictum, said that a person's reputation is in the nature of a property right, and thus, any attempt by the legislature to take away the plaintiff's remedy at law would be unconstitutional.

There have been decisions in only two states, Minnesota³⁷ and California,³⁸ which have held pecuniary damage statutes constitutional, and in the California case there was a strong dissent which asserted that the statute was unconstitutional not only under the

²⁸ *Id.* at 1043.

²⁹ MICH. COMP. LAWS sec. 3, p. 354 (1885).

³⁰ *Park v. The Detroit Free Press Co.*, 72 Mich. 560, 40 N.W. 731 (1888). In accord, *McGee v. Baumgartner*, 121 Mich. 287, 80 N.W. 21 (1889).

³¹ *Id.* at 733.

³² REV. STAT. OHIO sec. 5094 (1900).

³³ *Byers v. Meridian Printing Co.*, 84 O. S. 408, 95 N.E. 917 (1911).

³⁴ 2 N. J. COMP. STAT. sec. 226 (1910); N. C. LAWS c. 557, sec. 1 (1901); N. D. COMP. LAWS sec. 9562 (1913).

³⁵ *Lindsey v. Evening Journal Association*, 10 N. J. M. 1275, 163 A. 245 (1932); *Osborn v. Leach*, 135 N. C. 628, 47 S.E. 811 (1904).

³⁶ *Meyerle v. Pioneer Publishing Co.*, 45 N. D. 568, 178 N.W. 792, 794 (1920).

³⁷ *Allen v. Pioneer Press Co.*, 40 Minn. 180, 41 N.W. 936 (1889) (Statute requires good faith).

³⁸ *Werner v. Southern California Associated Newspapers*, 35 Cal. 121, 216 P. 2d 825 (1950).

"due process of law" clause, but also under the "equal protection of the law" clause of the fourteenth amendment. The dissenting justice said, in part:

"I submit that the legislation in question makes an actual, palpable, wholly unreasonable and arbitrary classification. Newspapers and radio broadcasts are singled out for the extension of a privilege which is not given to individuals, magazine publishers, or other periodicals, sky-writers, sound trucks, banner-bearing dirigibles, and bill-boards, and probably television and motion picture producers."³⁹

Since only two out of eight states that have considered pecuniary damage statutes have upheld them as constitutional, the majority view would seem to be that statutes such as the proposed Kentucky amendment are not valid under the federal constitution. It is also to be doubted that such an amendment would be valid under the constitution of Kentucky itself. The Kentucky constitution provides: "All courts shall be open, and every person *for an injury done him in his lands, goods, person or reputation*, shall have remedy by due course of law, and right and justice administered without sale, denial or delay."⁴⁰ (Writer's italics). Thus, in this constitution there is an express provision that an injured reputation requires relief by due process of law. Under the amendment, if a retraction is made, the defamed person could recover money damages if there were any, and nothing if no money damages had arisen. There would be no mention of damages for the injured reputation; there would be no relief for the injured reputation. The amendment would completely do away with any remedy for the plaintiff's loss of reputation and, it is submitted, would be unconstitutional under Section 14 of the Constitution of Kentucky.

The Kentucky Constitution also provides: "All men . . . are equal; and *no grant of exclusive*, separate public emoluments or *privileges* shall be made to any man or set of men. . ."⁴¹ (Writer's italics). It is arguable that the proposed amendment would give exclusive privileges to newspapers and visual or sound broadcasters. If a defamatory statement was made by a newspaper it

³⁹ *Id.* at —, 216 P. 2d at 836.

⁴⁰ KY. CONST. sec. 14.

⁴¹ *Id.* sec. 3.

need merely retract and thereby limit its liability to special damages; but if the defamatory statement was made by an individual, he could admit his error and apologize repeatedly and still be liable for general damages. Is this equal protection under the laws?⁴²

It has been contended that such statutes do not constitute privilege because they include all newspapers and all broadcasters, and this particular class must be free to disseminate the news and must be protected from excessively large jury verdicts.⁴³ However, it must be remembered that "Liberty is not license". Freedom to disseminate news must not encroach upon the individual's inherent constitutional rights. Disseminators contend that they should have this special right because upon them lies the special burden of turning out news rapidly with the help of proof readers and announcers, over whose negligence, malicious errors, or ad libs the owners have little control.⁴⁴ However, it is to be noted that a special right of this sort might well take away all incentive to attempt to control the negligence of employees at the expense of the individual. Too, disseminators can spread the risk by owning insurance to protect them from actions of this kind; while it would be extremely impractical for each individual to insure himself against defamation. As to the excessively large jury verdicts, it has been said, "The assertion . . . that juries are disposed to make excessive awards of damages against newspapers and radio stations in actions of this character is not only an unjust reflection upon our jury system, but is factually and historically untrue."⁴⁵ Thus, not only as a question of expediency but also as a question of inalienable constitutional rights, an amendment substituting retraction for general damages should not be passed in Kentucky.

Section (2) of House Bill No. 63 states that if someone other than the owner of the broadcasting station or his agent utters the defamatory matter, the action shall be dismissed unless the plaintiff proves that the owner or his agent failed to exercise due care.

⁴² "Their purpose (Sections 3 and 26 of the Ky. Constitution) was to place all persons similarly situated upon a plane of equality under the law, and to fix it so that it would be impossible for any class to obtain preferred treatment . . ." *Fisher v. Grieb*, 272 Ky. 166, 169, 113 S.W. 2d 1139, 1140 (1938).

⁴³ *Supra* note 38.

⁴⁴ See 1951 WASH. U. L. Q. 133.

⁴⁵ *Supra* note 38 at —, 216 P. 2d at 836. (The writer went on to cite statistics as to jury verdicts against newspapers in California.)

By majority view, the laws of defamation and not the laws of negligence apply to libelous statements made on the radio.⁴⁶ Under the laws of defamation the disseminator is held absolutely liable for any defamatory matter whether he was negligent or not.⁴⁷

The law of radio defamation is in its infancy and authorities differ as to whether such defamation should be considered slander,⁴⁸ libel,⁴⁹ or a separate tort.⁵⁰ It is submitted that legislation concerning radio and television defamation is needed, but the foregoing amendment would place too much of the burden upon the plaintiff. If the broadcasting station proved that neither the owner nor his agents were negligent, the plaintiff's only recourse would be to track down the malicious or negligent person, be he announcer, script writer, or janitor, and then prove the negligence. This would be an impractical if not impossible task to place on the plaintiff who, if by chance he procured a judgment, would often find it unenforceable. "... there is no need and no justification for such sacrifice of passive and innocent victims in order to favor the most powerful and most dangerous agency for defamation that the world has ever seen."⁵¹ As was previously stated, the disseminator could insure himself against such risks, while such insurance taken out by individuals would be frivolous. It may occasionally be harsh to award a judgment against the radio station for the maliciousness or negligence of someone not in its regular employ, but it would be harsher still to let the uninsured plaintiff suffer injury by defamation without recourse. It seems that a balancing of interests would leave the burden on the radio station which is, after all, engaged in the business of dissemination of programs and is receiving the profits from the use of its facilities. If the station is not the direct employer of every radio "artist", it should at least retain some ultimate responsibility beyond that of a lessor.

There is also a proviso in Section (2) of House Bill No. 63 which asserts that the radio station shall "in no event" be liable

⁴⁶ 44 AM. JUR. 196 (1942).

⁴⁷ Vold, *Defamation by Radio*, 19 MINN. L. REV. 611, 613 (1934-5).

⁴⁸ Meldrum v. Australian Broadcasting Co., Ltd., Vict. L. R. 425 (1932).

⁴⁹ Sorenson v. Wood, 123 Neb. 348, 243 N.W. 82 (1932).

⁵⁰ Summit Hotel Co. v. National Broadcasting Co., 336 Pa. 182, 8 A. 2d 302 (1939).

⁵¹ Vold, *supra* note 47, at 660.

for any defamatory utterances made by a person speaking as a candidate for public office. This section was probably included to protect the broadcaster from a recent ruling of the Federal Communications Commission which provides:

"If any licensee shall permit any person who is a legally qualified candidate for any public office to use a broadcasting station, he shall afford equal opportunities to all other such candidates for that office in the use of such broadcasting station. . . . *Provided*, that such licensee shall have no power of censorship over the material broadcast under the provisions of this section. No obligation is imposed upon any licensee to allow the use of its station by any such candidate."⁵²

This limitation upon censorship was recently held to be absolute even in the case of material which is libelous.⁵³ The broadcaster may be placed in a precarious position by this legislation. If he allows one candidate to use the broadcasting facilities, he must open his doors to others, and he is not permitted to censor any of their material. Thus, if any defamatory statements were made, he might be unavoidably liable in a civil action.

In this situation we must again balance the interests, and it seems only just that the broadcaster, rendered helpless by an administrative rule, should be protected as against the victim who may still seek relief from the speaker himself.⁵⁴ To suggest that no radio station allow any political candidate to use its facilities is an absurdity, but this would be the broadcaster's only method of self protection. Protection might, therefore, reasonably be offered to the broadcasters by the state legislatures.⁵⁵ It is believed that the proviso in Section (2) of the proffered bill is worthwhile, except that it does not limit the immunity to situations in which an owner or agent of the station did not take part. Under this

⁵² 48 STAT. 1088 (1934), 47 U. S. C. sec. 315 (1941).

⁵³ Port Huron Broadcasting Co., Docket No. 6987, Jan. 30, 1948, 4 Pike and Fischer Radio Reg. 1 (1948).

⁵⁴ For further discussion of this subject see Remmers, *Recent Legislative Trends in Defamation by Radio*, 64 HARV. L. REV. 727 at 747 (1950-51).

⁵⁵ It is to be noted that the FCC in the Port Huron case (*supra* note 53) held that a broadcaster could not be liable in a civil action under state law because the federal law has "occupied the field". However, the Supreme Court has not yet passed on the ruling. It is suggested that a state law similar to the proviso in House Bill No. 63 is none the less desirable since the Supreme Court might decide that the federal law does not "occupy the field", or even that the federal legislation is unconstitutional.

amendment the station owner or agent could sanction or even promote the defamation and still be protected by the immunity.

The bill in question, House Bill No. 63, although passed by the House of Representatives, did not pass the Kentucky Senate. Instead, the Senate introduced and passed Committee Substitute for House Bill No. 63⁵⁶ which, after setting out details fair to both plaintiff and defendant as to where and when a retraction should be made, provides that if the retraction is made and there is an absence of malice, no punitive damages shall be recovered, and the retraction may be considered in mitigation of other damages. This second proposal also applied to newspapers and visual or sound radio broadcasts, and it would make the three media liable to the same extent for defamation under a codification similar to the rules now applied in Kentucky in cases of newspaper defamation. It is submitted that legislation is certainly needed in this field. A bill similar to the second proposed amendment should be passed, so that the law on defamation and retraction as pertaining to newspapers will apply to broadcasts, and will be clear and just to both the disseminator and the victim.

DIANNE LOUISE MCKAIG

APPENDIX

SECTION I

House Bill No. 63 introduced January, 1952 to the Ky. House of Representatives.

(1) (a) In any action for damages for the publication of a defamatory statement in a daily or other newspaper, or by a visual or sound radio broadcast, the plaintiff shall recover no more than special damages unless he shall allege and prove that he made a sufficient demand for correction and that the newspaper, or the radio or television broadcasting station, failed to make conspicuous and timely publication of said correction.

(b) A "sufficient demand for correction" is a demand for correction which is in writing; which is signed by the plaintiff or his duly authorized attorney or agent; which specifies the statement or statements claimed to be false and defamatory, states wherein they are false, and sets forth the true facts; and which is delivered to the defendant prior to the commencement of the action.

(c) A "correction" is either (i) the publication of an acknowledgment that the statement or statements specified as false and defamatory in the plaintiff's demand for correction are erroneous, or (ii) the publication of the plaintiff's statement of the true facts (as set forth in his demand for correction) or a fair summary thereof, exclusive of any portions thereof which are defamatory of an-

⁵⁶ Appendix section 2.

other, obscene, or otherwise improper for publication. If the demand for correction has specified two or more statements as false and defamatory, the correction may deal with some of such statements pursuant to (i) above and with other of such statements pursuant to (ii) above.

(d) A "conspicuous publication" in a newspaper is a publication which is printed in substantially as conspicuous a manner as the statement or statements specified as false and defamatory in the demand for correction; and for this purpose the Sunday and daily issues of a newspaper shall be deemed equivalent. A "conspicuous publication" in a visual or sound radio broadcast is a publication which is broadcast at substantially the same time of day, and with the same sending power, as the statement or statements specified as false and defamatory in the demand for correction. A publication in a particular manner which is agreeable to the plaintiff shall in any event be deemed "conspicuous."

(e) A "timely publication" in a daily newspaper is a publication within three business days after the day on which a sufficient demand for correction is received by the defendant. A "timely publication" in a newspaper other than a daily newspaper is a publication in or prior to the next regular issue which is published not less than three business days after the day on which a sufficient demand for correction is received by the defendant. For this purpose the Sunday and daily issues of a newspaper shall be deemed equivalent. A "timely publication" in a visual or sound radio broadcast is a publication within three business days after the day on which a sufficient demand for correction is received by the defendant. A "business day" is any day other than a Sunday or legal holiday. A publication in a particular issue or on a particular day which is agreeable to the plaintiff shall in any event be deemed "timely."

(f) "Special damages" are pecuniary damages which the plaintiff alleges and proves that he has suffered in respect to his property, business, trade, profession, or occupation (including such amounts of money as the plaintiff alleges and proves he has expended as a proximate result of the alleged defamation), and no other.

(2) If in any action for damages for the publication of a defamatory statement on a visual or sound radio broadcast, the defendant proves that said defamatory statement has been uttered by one other than the owner, licensee, or operator of the broadcasting station or one acting as the agent or employee of said owner, licensee or operator, the action shall be dismissed unless the plaintiff shall allege and prove that such owner, licensee, operator, agent or employee has failed to exercise due care to prevent the publication of said statement in said broadcast; provided, however, that in no event shall the owner, operator or licensee of a radio or television broadcasting station, or one acting as the agent or employee of such owner, operator or licensee, be held liable for the utterance of a defamatory statement in a visual or sound radio broadcast over the facilities of such station by any person speaking as a legally qualified candidate for public office.

SECTION II

Committee Substitute for House Bill No. 63.

(1) In any action for damages for the publication of an alleged erroneous and defamatory statement by a newspaper, or by visual or sound radio station, the defendant shall be entitled to allege and offer proof that said statement was published without malice, and that the plaintiff failed to demand a retraction in the manner provided by subsection (2) of this section, or that the defendant made a retraction in the manner provided by subsections (3) and (4), or by subsection (5), of this section;

(2) Each demand for retraction shall be in writing, and shall be signed by the person, or by his attorney or agent, who desires retraction of a particular statement, and shall specify wherein the statement is claimed to be erroneous and defamatory;

(3) Each retraction of an alleged erroneous and defamatory statement that is made by a newspaper after receipt by it of demand therefor, as described in subsection (2) of this section shall, if the newspaper is a daily newspaper, be first published in a regular issue thereof within three business days (exclusive of Sundays and holidays) immediately following receipt by such newspaper of said demand for retraction. If the newspaper is not a daily newspaper, such retraction shall be published either in the next regular issue thereof immediately following receipt of said demand for retraction, or in the next regular issue thereof that is published more than three business days (exclusive of Sundays and holidays) immediately following receipt by such newspaper of said demand for retraction. Each retraction of an alleged erroneous and defamatory statement that is made by a visual or sound radio station after receipt by it of demand therefor, as described in subsection (2) of this section, shall be broadcast by such station within three days immediately following receipt by such station of said demand for retraction;

(4) For the purposes of this section, a retraction shall be an accurate correction or explanation of the statement complained of, and shall be published in the following manner:

(a) In the case of a newspaper, the retraction shall be published in as conspicuous and public a manner as that in which the alleged defamatory statement was published, and shall be in the same type and in the same place in at least two successive issues of the same publication, accompanied by editorials retracting the alleged defamatory statement.

(b) In the case of a visual or sound radio station, the retraction shall be broadcast from the same station at substantially the same time of day, and with the same sending power, as the alleged defamatory statement was broadcast;

(5) Any newspaper, or visual or sound radio station, may, prior to receiving a demand for retraction as described in subsection (2) of this section, publish or broadcast a retraction of any erroneous statement in the manner prescribed in subsection (4) of this section, regardless of whether same is, or is not, defamatory;

(6) Allegations and proof of any of the matters set out in subsection (1) of this section shall prevent the recovery of punitive damages, and may be considered in mitigation of other damages.

